Wisma Perkasa Sdn Bhd v Weatherford (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-245–02 OF 2012
VAZEER ALAM J
15 DECEMBER 2016

Contract — Tenancy agreement — Negotiations to conclude tenancy agreements — Protracted negotiations between plaintiff landlord and defendant tenants to renew tenancy agreements failed — Plaintiff allowed defendants after expiry of tenancies to continue to be in occupation pending negotiations — Defendants continued to pay plaintiff old rentals — Plaintiff ended negotiations by issuing defendants unreasonably short quit notice and claimed for double rental — Plaintiff alleged defendants were mala fide in negotiations and merely bought time to look for rental premises elsewhere — Whether general duty in law existed for parties to have negotiated in good faith such that failure to do so constituted a cause of action — Whether plaintiff failed to adduce evidence to show defendants had acted mala fide in the negotiations

Landlord and Tenant — Rent — Double rent — Plaintiff claimed double rent/double value from defendants for holding over after tenancy agreements expired — Claim based on s 28(4)(a) of the Civil Law Act 1956 or 'failure to yield up' clause in tenancy agreements — Defendants remained in occupation after expiration of tenancy agreements with plaintiff's consent pending negotiations for renewal of tenancies — Plaintiff continued to accept rent paid by defendants during negotiation period — Plaintiff failed to give defendants proper notice to quit and deliver up vacant possession or pay double rental in default — Whether plaintiff failed to show defendants willfully or contumaciously held over or failed, neglected or refused to yield up demised premises on demand — Whether plaintiff's one-month notice to quit invalid in law — Whether defendants reasonably complied with quit notice by returning demised premises to plaintiff 2 1/2 months after receiving quit notice

The plaintiff owned a commercial building in which three floors (the 11th, 12th and 14th floors ('the demised premises')) were rented out to the defendants. After the expiry of the respective tenancy agreements, the defendants, with the plaintiff's consent, continued to remain in occupation of the demised premises pending negotiations to renew the tenancies. During the period of negotiations, the defendants continued to pay the rentals they had been paying and the plaintiff accepted the same without protest. The negotiations dragged on for two years without consensus. Finally, by a notice dated 19 August 2011 ('the quit notice'), the plaintiff notified the defendants

to quit and deliver up vacant possession of the demised premises by 1 October 2011. The defendants protested over the unreasonably short notice and handed back vacant possession only on 31 October 2011. In the instant suit, the plaintiff sued the defendants for holding over after the expiry of the respective tenancy agreements and claimed, inter alia, for double rent or double value pursuant to s 28(4)(a) of the Civil Law Act 1956 or under the 'failure to yield up' clause in the tenancy agreements. The plaintiff alleged that the defendants were not bona fide in negotiating for a renewal of the tenancies and took advantage of the negotiations to remain in occupation until they found alternative premises. It was alleged that the first defendant ('D1') held over from 1 May 2009–31 October 2011 (for the 11th floor) and from 1 April 2009–31 October 2011 (for the 12th floor) while the second defendant ('D2') held over from 1 February 2011–31 October 2011 (for the 14th floor). Counterclaiming for the return of the deposits they had paid under the respective tenancies, the defendants denied that they had willfully or contumaciously held over or that they had failed, refused or neglected to yield up the demised premises on demand. The defendants also contended that the plaintiff's quit notice was unreasonably short and invalid in law. D1, in particular, pleaded that it only occupied the 12th floor on a monthly tenancy from April 2008 after D2 prematurely quit the premises two months earlier with the plaintiff's consent and thereby ended its tenancy agreement with the plaintiff. D1 denied that it had in any way taken over D2's rights and obligations under the said tenancy agreement.

Held, dismissing the plaintiff's claim and allowing the counterclaims for the refund of the deposits:

(1) The plaintiff failed to prove its case on balance of probabilities against the defendants. As a corollary to the dismissal of the plaintiff's claims, all deposits paid by the defendants to the plaintiff had to be refunded to them (see paras 96–97).

(2) Section 28(4)(a) of the Civil Law Act 1956, was a penal provision and conferred discretion on the court as to whether or not to impose double value/rent. The phrase 'shall be chargeable' in that section was merely an enabling one and the recovery of double rent under s 28(4)(a) was accordingly not automatic or as of right for the landlord but a matter for the court's discretion (see paras 40–41).

(3) Based on high authority, it was a requirement under s 28(4)(a) of the Civil Law Act 1956 that there had to be a wilful or contumacious holding over by the tenant in order for the landlord to claim double value/rent. There had to be something more than mere holding over after expiration/determination of the tenancy. There had to be wilful conduct or intent or contumacy on the tenant's part in holding over the demised premises; an intention or conduct by the tenant to refuse to deliver up the

demised premises or to prevent the landlord from obtaining possession of the same after expiration/determination of the tenancy with the knowledge that he (the tenant) had no right to remain in possession. The burden of proof lay on the landlord (the plaintiff) to show that the tenant (the defendants) had continued to exercise a degree of possession and control over the demised premises that prevented the landlord from taking possession of the demised premises after the expiration/determination of the tenancy. The plaintiff in the instant case failed to discharge its burden of proof in this regard. Even based on the 'failure to yield up' clause in sections 8.43 and 7.47 of the respective tenancy agreements, the plaintiff had failed to show that there was failure, neglect or refusal on the part of the defendants to yield up the demised premises (see paras 50, 54, 76, 91 & 94).

(4) The plaintiff had, after the expiry of the 11th, 12th and 14th floor tenancy agreements and prior to issuing its quit notice dated 19 August 2011, consented to the defendants continuing to remain in possession of the demised premises pending negotiations for fresh tenancies to be agreed upon. During this period, the defendants had continued paying their monthly rentals for the respective demised premises (including service charges) which the plaintiff had accepted. If the plaintiff had wished to impose double rental, it ought to have given reasonable notice to the defendants to vacate either at the very expiry of the respective tenancies or during the period of negotiations with the warning that their continued possession of the premises after the expiry of the notice period would be at double the rental. The plaintiff could not unilaterally invoke the claim for double rental in the midst of negotiations as a means of exerting pressure on the defendants to conclude the negotiations upon terms they did not agree with. The fact that during the negotiations the plaintiff had accepted the monthly rentals from the defendants based on the rates in the expired tenancy agreements demolished its contention that it had reserved its rights to double rental (see paras 75 & 95).

(5) The one-month notice to quit given by the plaintiff in its letter dated 19 August 2011 was an unfair and unreasonable time-frame and the notice was invalid and ineffective in law. The defendants' delivery of vacant possession of the demised premises back to the plaintiff on 31 October 2011 was done within a fair and reasonable time from the receipt of the plaintiff's quit notice (see paras 71–72 & 74).

(6) There was no substance to the plaintiff's allegation that the defendants were mala fide in their negotiations or that they had no genuine desire to renew the expired tenancies and that the negotiations were merely a ruse to buy time to move out to alternate premises. To succeed in those allegations, the plaintiff had to establish as a matter of law that there was an affirmative or positive duty on the parties to negotiate in good faith.

There was, in law, no such general duty. The parties herein had no specific or general duty to negotiate with each other in good faith. The plaintiff had failed to adduce cogent evidence to show the defendants had acted mala fide in their negotiations (see paras 79, 82, 84 & 90).

(7) Insofar as the 12th floor demised premises was concerned, the plaintiff's claim against D1 failed because it was based on the flawed premise that D1 had taken over the tenancy agreement for that premises from D2. The plaintiff failed to establish that there was a novation of the 12th floor tenancy agreement or an assignment of the rights and benefits thereunder from D2 to D1. The facts showed that the 12th floor tenancy agreement between the plaintiff and D2 was discharged on 1 February 2008 when D2 vacated the premises with the plaintiff's consent. D1 moved into the 12th floor only in April 2008 on the basis of a monthly tenancy. The contemporaneous documentary evidence showed that the parties intended to enter into a new tenancy agreement for the 12th floor and not that D1 was to take over the unexpired portion of D2's 12th floor tenancy agreement (see paras 63, 68–67 & 71).

[Bahasa Malaysia summary

Plaintif memiliki bangunan komersial di mana tiga tingkat (tingkat 11, 12 dan 14 ('premis tersebut')) disewa kepada defendan-defendan. Selepas tamatnya perjanjian penyewaan masing-masing, defendan-defendan, dengan persetujuan plaintif, kekal menghuni premis tersebut sementara menanti rundingan membaharui sewaan. Semasa tempoh rundingan, defendan terus membayar sewa yang mereka bayar dan plaintif menerimanya tanpa protes. Rundingan ini meleret selama dua tahun tanpa persetujuan. Akhirnya, dengan notis bertarikh 19 Ogos 2011 ('notis tamat'), plaintif memaklumkan defendan untuk keluar dan menyerahkan milikan kosong premis yang dihuni pada 1 Oktober 2011. Defendan-defendan membantah notis singkat yang tidak munasabah ini dan menyerahkan semula milikan kosong pada 31 Oktober 2011. Dalam tuntutan ini, plaintif mengambil tindakan terhadap defendan-defendan kerana masih menghuni walaupun perjanjian penyewaan masing-masing telah tamat dan menuntut, antara lain, untuk penyewaan dua atau nilai berganda menurut s 28(4)(a) Akta Undang-Undang Sivil 1956 atau bawah fasal 'kegagalan untuk menyerah' dalam perjanjian penyewaan. Plaintif mendakwa defendan tidak dapat berbuat apa-apa dalam berunding bagi pembaharuan sewaan dan mengambil kesempatan atas rundingan untuk kekal menghuni hingga mereka memperoleh premis alternatif. Didakwa bahawa defendan pertama ('D1') memegangnya dari 1 Mei 2009–31 Oktober 2011 (untuk tingkat 11) dan dari 1 April 2009–31 Oktober 2011 (untuk tingkat 12) manakala defendan kedua ('D2') memegang dari 1 Februari 2011–31 Oktober 2011 (untuk tingkat ke-14). Menuntut balas bagi pengembalian deposit yang telah mereka bayar bawah penyewaan masing-masing, defendan menafikan mereka sengaja atau secara terang-terangan dipertanggungjawabkan atau

bahawa mereka telah gagal, enggan atau cuai untuk menyerahkan premis tersebut apabila diminta. Defendan-defendan juga berpendapat bahawa notis tamat plaintif terbatal dan tidak sah bawah undang-undang. D1, secara khususnya, mengaku hanya menghuni tingkat 12 pada penyewaan bulanan dari April 2008 selepas D2 berlepas awal dari premis dua bulan lebih awal dengan persetujuan plaintif dan dengan itu menamatkan perjanjian penyewaannya dengan plaintif. D1 menafikan telah mengambil alih hak dan kewajipan D2 dalam perjanjian penyewaan tersebut.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas bayaran balik deposit:

(1) Plaintif gagal membuktikan kesnya atas imbangan kebarangkalian terhadap defendan. Sebagai bukti tuntutan plaintif, semua deposit yang dibayar oleh defendan kepada plaintif perlu dikembalikan kepada mereka (lihat perenggan 96–97).

(2) Seksyen 28(4)(a) Akta Undang-Undang Sivil 1956, adalah satu peruntukan jenayah dan memberikan budi bicara kepada mahkamah tentang sama ada atau tidak untuk mengenakan gandaan nilai/sewa. Ungkapan 'boleh dikenakan' dalam seksyen itu sekadar membolehkan dan pemulihan dua kali sewa bawah s 28(4)(a) adalah sewajarnya tidak automatik atau hak untuk tuan tanah tetapi satu perkara untuk budi bicara mahkamah (lihat perenggan 40–41).

(3) Berdasarkan nas-nas utama, adalah menjadi keperluan bawah s 28(4)(a) Akta Undang-Undang Sivil 1956 bahawa harus ada pegangan yang disengajakan atau kontrakan oleh penyewa agar tuan tanah boleh menuntut nilai berganda/sewa. Harus ada sesuatu yang lebih daripada sekadar pegangan selepas tamat tempoh/penentuan penyewaan. Perlu ada kelakuan yang sengaja atau niat atau kontraktual pada pihak penyewa dalam memegang premis tersebut; niat atau kelakuan oleh penyewa untuk enggan menyerahkan premis atau menghalang tuan tanah daripada memperoleh milikan ini selepas tamat tempoh/penentuan penyewaan dengan pengetahuan bahawa dia (penyewa) tidak mempunyai hak untuk terus kekal dalam milikan. Beban bukti terletak pada tuan tanah (plaintif) untuk menunjukkan bahawa penyewa (defendan) terus menjalankan tahap pemilikan dan kawalan atas premis yang menghalang tuan tanah daripada mengambil milik premis setelah tamat tempoh/penentuan penyewaan. Plaintif dalam kes ini gagal melepaskan beban bukti dalam hal ini. Walaupun berdasarkan klausa 'kegagalan menghasilkan' dalam seksyen 8.43 dan 7.47 perjanjian penyewaan masing-masing, plaintif gagal menunjukkan bahawa terdapat kegagalan, pengabaian atau penolakan pihak defendan untuk menghasilkan premis yang telah dipindahkan oleh pajakan (lihat perenggan 50, 54, 76, 91 & 94).

(4) Plaintif telah, selepas tamatnya perjanjian penyewaan tingkat ke-11, ke-12 dan ke-14 dan sebelum mengeluarkan notis tamat bertarikh 19 Ogos 2011, bersetuju agar defendan terus kekal dalam premis tersebut sementara sedang menunggu rundingan untuk tuntutan baru dipersetujui. Dalam tempoh ini, defendan terus membayar sewa bulanan mereka untuk premis tersebut (termasuk caj perkhidmatan) yang diterima oleh plaintif. Sekiranya plaintif ingin menuntut sewa gandaan, ia sepatutnya memberi notis yang munasabah kepada defendan untuk mengosongkan sama ada pada tamat tempoh tamat sepatutnya atau semasa tempoh rundingan dengan amaran bahawa milikan berterusan premis mereka selepas tamat tempoh tempoh notis akan dua kali ganda sewa. Plaintif tidak boleh secara satu pihak memohon tuntutan untuk sewa gandingan semasa rundingan sebagai cara untuk memberi tekanan kepada defendan untuk membuat kesimpulan rundingan atas terma yang mereka tidak setujui. Hakikat bahawa semasa rundingan, plaintif telah menerima sewa bulanan daripada defendan berdasarkan kadar dalam perjanjian penyewaan yang telah tamat dibatalkan menyangkal hujahan bahawa ia mengetepikan haknya untuk mendapat sewaan berganda (lihat perenggan 75 & 95).

(5) Notis tamat satu bulan oleh plaintif dalam suratnya bertarikh 19 Ogos 2011 adalah tempoh masa yang tidak adil dan tidak munasabah dan notis itu tidak sah dan tiada kesan undang-undang. Penyerahan milikan kosong defendan-defendan premis kepada plaintif pada 31 Oktober 2011 dilakukan dalam masa yang adil dan munasabah dari penerimaan notis tamat plaintif (lihat perenggan 71–72 & 74).

(6) Tiada dakwaan terhadap tuduhan plaintif bahawa defendan-defendan bertindak mala fide dalam rundingan mereka atau mereka tidak mempunyai keinginan sah untuk membaharui sewaan yang telah tamat tempoh dan bahawa rundingan hanyalah satu cara untuk mengambil masa untuk beralih ke premis alternatif. Untuk berjaya dalam tuduhan itu, plaintif perlu membuktikan di bawah undang-undang bahawa terdapat tanggungan atau tanggungjawab positif terhadap pihak-pihak untuk berunding dengan niat baik. Tidak terdapat, dari segi undang-undang, kewajipan sedemikian. Pihak-pihak ini tidak mempunyai kewajipan khusus atau umum untuk berunding dengan satu sama lain dengan suci hati. Plaintif gagal mengemukakan keterangan jelas untuk menunjukkan defendan-defendan bertindak mala fide dalam rundingan mereka (lihat perenggan 79, 82, 84 & 90).

(7) Bagi tingkat ke-12 premis berkenaan, tuntutan plaintif terhadap D1 gagal kerana ia berdasarkan hujahan cacat bahawa D1 telah mengambil alih perjanjian penyewaan untuk premis itu daripada D2. Plaintif gagal membuktikan bahawa terdapat pembaharuan perjanjian penyewaan tingkat ke-12 atau penyerahan hak dan faedah daripada D2 hingga D1.

Fakta menunjukkan bahawa perjanjian penyewaan tingkat ke-12 antara plaintif dan D2 telah dilepaskan pada 1 Februari 2008 apabila D2 mengosongkan premis itu dengan persetujuan plaintif. D1 berpindah ke tingkat ke-12 hanya pada bulan April 2008 atas dasar penyewaan bulanan. Keterangan dokumentar semasa menunjukkan bahawa pihak-pihak berniat memasuki perjanjian penyewaan baru untuk tingkat ke-12 dan bukannya D1 akan mengambil alih perjanjian penyewaan tingkat ke-12 yang belum tamat (lihat perenggan 63, 68–67 & 71).]

Notes

For a case on double rent, see 9 *Mallal's Digest* (5th Ed, 2015) para 1238.
For cases on tenancy agreement in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7025–7042.

Cases referred to

Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619, CA (refd)
Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)
Bank of Credit and Commerce International SA v Ali and others [2002] 1 AC 251, HL (refd)
Basnol Abol & Ors v The State Government of Sarawak & other appeals [2004] 2 CLJ 553, FC (refd)
Baume & Co Ltd v AH Moore Ltd [1958] 2 All ER 113, CA (refd)
Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
Cannock Chase District Council v Kelly [1978] 1 All ER 152, CA (refd)
Crook v Whitbread 88 LJKB 959 (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)
Eight Development (M) Sdn Bhd v Antara Steel Mills Sdn Bhd [2004] 2 CLJ 32, CA (refd)
HSBC Bank (M) Bhd v Wui Ling Timber (Bintulu) Sdn Bhd & Anor [2000] 8 CLJ 197, HC (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)
Housing and Development Board v Lee Sem Yoong Sdn Bhd [1987] 2 MLJ 204, SC (refd)
Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433, CA (refd)
JR Lincks Educational Consultants Sdn Bhd v Goh & Sons Enterprise Sdn Bhd [2008] 3 CLJ 815, CA (folld)
KBB Properties Sdn Bhd v Yong Chon Chiang [2006] 6 CLJ 421, HC (refd)
KFH Sjarah House (M) Sdn Bhd v Lembaga Kemajuan Wilayah Pulau Pinang [2012] 3 MLJ 850, HC (refd)
Kerajaan Negeri Sarawak & Ors v Basnol bin Abol (deceased) & Ors and other

appeals [2003] 1 MLJ 376, CA (refd)
Krishna Sreedhara Panicka v Chiam Soh Yong Realty Co Ltd [1983] 1 MLJ 65, FC (refd)
Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd [2006] 6 MLJ 544, CA (refd)
LYL Hooker Sdn Bhd v Tevanaigam Savisthri & Anor [1987] 2 MLJ 52, SC (refd)
Lee Wah Bank Ltd v Afro-Asia Shipping Co (Pte) Ltd [1992] 2 SLR 93, CA (refd)
Mari Boutique Sdn Bhd v Jaya Jusco Stores Bhd [2004] 1 MLJ 74, HC (refd)
Nancy Simon d/o SP Simon v Peninsular Park Sdn Bhd [2008] 7 MLJ 625, HC (refd)
Samundee Devan a/l Kerishnan Muthu v Public Prosecutor [2009] 1 MLJ 697, CA (refd)
Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 5 MLJ 157, CA (refd)
Soong Ah Chow & Anor v Lai Kok Cheng [1986] 1 MLJ 42, FC (refd)
Tay Lai Kiang & Ors v Public Bank Bhd [1996] MLJU 426; [1997] 5 CLJ 639, HC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
The Queen v Holl and Others (1881) 7 QBD 575, CA (refd)
Toihurst v Associated Portland Cement Manufacturers (1900) Ltd [1902] 2 KB 660, CA (refd)
Walford and Others v Miles and Another [1992] 2 AC 128, HL (refd)
Wee Tiang Yap v Chan Chan Brothers [1986] 1 MLJ 47, FC (refd)

Legislation referred to

Civil Law Act (1988 Ed, Cap 43) [SG] s 19(4)
Civil Law Act (Revised Edition 1999, Cap 43) [SG] s 28(4)
Civil Law Act 1956 s 28(4), 28(4)(a)
Contracts Act 1950 s 75

Mubashir Mansor (Damian Kiethan with him) (Skrine) for the plaintiff.
T Sudharsanan (YM Low and Jeremy Ho with him) (Shook Lin & Bok) for the first defendant.
Rajendra Navaratnam (Amy Tan Yan Ee with him) (Azman Davidson & Co) for the second defendant.

Vazeer Alam J:

[1] The counsel for the first defendant has in his written submissions well set out the facts and issues, which I have adopted in large measure and set them out below.

BACKGROUND FACTS

[2] The plaintiff is the registered owner of a commercial building known as Rohas Perkasa. The defendants on the other hand were tenants of the plaintiff. In this action, the plaintiff is suing the defendants for holding over of the respective demised premises occupied by them as tenants after the expiry of the tenancies of the 11th, 12th and 14th floors of Rohas Perkasa.

[3] The first defendant, at ail material times, occupied and was in possession of:

(a) part of the 11th floor, West Wing, Rohas Perkasa, measuring approximately 5,668 sqft ('the 11th floor demised premises'); and

(b) part of the 12th floor, West Wing and East Wing (portion), Rohas Perkasa, measuring approximately 14,940 sqft ('the 12th floor demised premises').

[4] The second defendant on the other hand, at all material times, occupied and was in possession of the 14th floor, West Wing and East Wing, Rohas Perkasa, measuring approximately 19,420 sqft ('the 14th floor demised premises').

[5] It is common ground that the parties were at all material times involved in negotiations for fresh tenancies of their respective tenancies. The negotiations on the part of the plaintiff were conducted primarily through Hj Muhd Mawardi bin Hasan ('PW1') and Nik Ryan M Daud bin Nik Daud ('PW2'). Whereas, the negotiations on the part of the defendants, were initially conducted primarily through Ms Choo Hee Swee (also known as Ms Bobbi Choo) ('PW8'). Subsequently, however, the negotiations on the part of the defendants were taken over by Mr Darrel Adam Fergus ('DW2') and then by Messrs Ooi and Zaharin Sdn Bhd (also known as Knight Frank Malaysia — through Mr Sarkunan Subramanian ('DW7') assisted by Mr Ben Miranda) together with Mr Heong Kin Choong (also known as Mr Roger Heong) ('DW4'). These negotiations are evidenced in writing.

[6] According to the defendants, the negotiations commenced as early as July 2007. Whilst, according to the plaintiff, the negotiations commenced in January 2009. However, the date of commencement of negotiations is not important for the determination of the issues at hand. Suffice to say that it is common ground that the parties were at all material times in a state of negotiations and that these negotiations had commenced no later than January 2009. These negotiations however were ultimately unsuccessful as the parties were unable to reach an agreement on the essential commercial terms, in particular, the rent and tenure.

[7] Negotiations having failed, by its letters dated 19 August 2011 (Bundle B8 (Tab 425 and Tab 426)), the plaintiff gave the defendants notice to determine the 11th, 12th and 14th floor tenancies and to quit and deliver vacant possession of the respective demised premises on or before 1 October 2011. The defendants had, by letters dated 26 August 2011 to the plaintiff (Bundle B8 (Tab 427 and Tab 428)), agreed to the determination of the said tenancies, but sought a fair and reasonable period to quit and deliver vacant possession of the respective demised premises to the plaintiff. The first and second defendants redelivered vacant possession of the respective demised premises to the plaintiff on 31 October 2011.

The plaintiff's claim against the defendants

[8] The plaintiff's claim as pleaded in the re-amended statement of claim ('RASOC') against the defendants is primarily and substantially for double value or rent. in this regard, the plaintiff's claim is for double of the alleged prevailing market rent of RM7.50 per sqft, or alternatively, for double of the respective monthly rentals of the demised premises at the expiry of the 11th, 12th and 14th floor tenancies.

[9] The plaintiff's claim for double value or rent is based on section 8.43 of the 11th floor tenancy agreement (Bundle A (Tab 3)), and section 8.43 of the 12th floor tenancy agreement (Bundle A (Tab 8)), and cl 7.47 of the so called 14th floor tenancy agreement (Bundle B7 (Tab 423)). Alternatively, the plaintiff's claim for double value or rent is based on s 28(4)(a) of the Civil Law Act 1956.

[10] The pleadings as well as the plaintiff's summary of case show that both the contractual, as well as the alternative statutory claim, for double value or rent are based on or arise from the same set of pleaded facts. The alleged facts are that:

(a) the defendants were not bona fide in the negotiations or, had no genuine desire whatsoever to renew the said tenancies or, at any rate were lackadaisical about the renewal of the said tenancies; and

(b) instead, the defendants were merely taking advantage of the negotiations to hold over the respective demised premises.

[11] The plaintiff further alleges that it had made it expressly or impliedly clear to the defendants that their right to claim for, inter alia, the double value or rent of the respective demised premises during the holding over period was reserved by their letter dated 22 April 2009, email dated 10 November 2009, letter dated 6 September 2010, email dated 5 October 2010, letters dated 15 November 2010, 28 April 2011 and 2 June 2011 and in meetings between

the representatives of the parties on 6 April 2011 and 6 May 2011 (Bundle B1 (Tab 38 and Tab 47), Bundle B2 (Tab 58, Tab 61, Tab 71, Tab 74 and Tab 70 and Bundle C1 (Tab 10)). A

[12] In addition, the plaintiff alleges that the defendants had unequivocally admitted to the fact of holding over of the respective demised premises and the liability for double value or rent aforesaid by making a request for waiver of the double value or rent in the letter dated 12 May 2011 from their agent, Messrs Ooi & Zaharin Sdn Bhd (also known as Knight Frank Malaysia), to the plaintiff: Bundle B2 (Tab 73). B C

[13] According to the plaintiff, the relevant periods of alleged holding over of the respective demised premises were as follows:

(a) in respect of the 11th floor demised premises, the first defendant is alleged to have held over from 1 May 2009 to on or about 31 October 2011; D

(b) in respect of the 12th floor demised premises, the first defendant is alleged to have held over from 1 April 2009 to on or about 31 October 2011; and E

(c) in respect of the 14th floor demised premises, the second defendant is alleged to have held over from 1 February 2011 to on or about 31 October 2011.

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[14] By reason of the matters aforesaid, the plaintiff's case is that the defendants are additionally liable to the plaintiff for exemplary damages.

[15] Apart from the claim for double value or rent and exemplary damages, the plaintiff also claims against the defendants for: G

(a) the alleged loss of income arising from the delay in reletting the respective demised premises for November 2011, being the prevailing market rental value or alternatively, at the respective rental rates as at the expiry of the 11th, 12th and 14th floor tenancies. According to the plaintiff this is pursuant to section 8.41 of the 11th floor tenancy agreement (Bundle A (Tab 3)), section 8.41 of the 12th floor tenancy agreement (Bundle A (Tab 8)), and cl 7.46 of the 14th floor tenancy agreement (Bundle B7 (Tab 423)) and/or the law; H

(b) in respect of the alternative claims for damages for the holding over of the respective demised premises on the basis of the rental rates as at the expiry of the 11th, 12th and 14th floor tenancies, the plaintiff also claims for the service charges in respect of the electricity tariff increase by TNB with effect from June 2011 by RM0.10 per sqft; and I

(c) interest and extra hour service charges in respect of the 11th floor tenancy, interest in respect of the 11th floor and unpaid increased service charges during the currency of the 14th floor tenancy and interest.

[16] Thus, a summary of the total claims by the plaintiff is as follows:

(a) on the basis of double the alleged prevailing market rental of RM7.50 per sqft:

(i) see annexure 1(a) to the RASOC in respect of the 11th floor tenancy agreement;

(ii) see annexures 3(a) and 3(c) to the RASOC in respect of the 12th floor tenancy agreement; and

(iii) see annexure 2(a) to the RASOC in respect of the 14th floor tenancy agreement;

(b) alternatively to (a) above, on the basis of double the respective monthly rentals as at the expiry of the 11th, 12th and 14th floor tenancy agreements:

(i) see annexure 1(b) to the RASOC in respect of the 11th floor tenancy agreement;

(ii) see annexure 3(b) and 3(d) to the RASOC in respect of the 12th floor tenancy agreement; and

(iii) see annexures 2(b) and 2(c) to the RASOC in respect of the 14th floor tenancy agreement;

(c) further interest on (a) or (b) above to the date of judgment;

(d) alternative to (a) and (b), damages and interest thereon to the date of judgment;

(e) exemplary damages and interest thereon to the date of judgment;

(f) costs on the basis of solicitor and client; and

(g) post judgment interest on the judgment sums.

The first defendant's defence

[17] As for the plaintiff's claim against the first defendant in respect of the 11th floor demised premises, the first Defendant essentially contends that:

(a) the first defendant continued to occupy and remain in possession of the 11th floor demised premises after 30 April 2009 (ie after the expiry of the 11th floor tenancy agreement), with the plaintiffs consent, pending negotiations with the plaintiff on the 'renewal' of the 11th, 12th and 14th floor tenancies;

(b) the first defendant paid the plaintiff a monthly rent of RM31,174 (inclusive of monthly service charges), which the plaintiff accepted;

(c) by its letter dated 19 August 2011, the plaintiff purportedly gave the first defendant notice to determine the 11th floor tenancy and to quit and deliver vacant possession on or before 1 October 2011;

(d) the one month notice to quit and deliver vacant possession was unfairly and unreasonably short and was thereby invalid and ineffective;

(e) hence, by its letter dated 26 August 2011 to the piaintiff, the first defendant agreed to the determination of the 11th floor tenancy, as no concluded agreement had been reached between the plaintiff and the defendants as to the renewal of the 11th, 12th and 14th floor tenancies, but sought a fair and reasonable period to quit and deliver vacant possession of the 11th floor demised premises;

(f) the first defendant admits that it continued to be in possession of the 11th floor demised premises until 31 October 2011 but contends that it was lawfully entitled to do so;

(g) in addition, the first defendant denies that:

(i) the 11th floor tenancy expired on 30 April 2009;

(ii) it had willfully or contumaciously held over the demised premises and kept the plaintiff out of possession thereof;

(iii) it had refused or neglected or otherwise failed to quit and deliver up vacant possession of the demised premises;

(iv) it is therefore liable to the plaintiff for double value or rent; and

(v) even if the first defendant is liable for double value the first defendant denies that the prevailing market rent of the 11th floor demised premises was RM7.50 per sqft.

[18] As for the plaintiff's claim against the first defendant in respect of the 12th floor demised premises, the first defendant essentially contends that:

(a) the second defendant vacated the demised premises on 1 February 2008 with the consent of the plaintiff. The 12th floor tenancy agreement dated 1 July 2006 was thereby discharged;

(b) the demised premises was then let to the first defendant on a monthly tenancy at a monthly rent of RM82,170 commencing from April 2008;

(c) further and/or in the alternative, the first defendant continued to occupy and remain in possession of the 12th floor demised premises after 31 March 2009 (ie after the alleged expiry of the 12th floor tenancy

agreement), with the plaintiff's consent, pending negotiations with the plaintiff on the 'renewal' of the 11th, 12th and 14th floor tenancies; and

(d) the first defendant paid the plaintiff a monthly rent of RM82,170 (inclusive of monthly service charges), which the plaintiff accepted.

[19] The first defendant's defence in respect of the 12th floor demised premises is otherwise the same as the first defendant's defence in respect of the 11th floor demised premises, that is:

(a) by its letter dated 19 August 2011, the plaintiff purportedly gave notice to determine the 12th floor monthly tenancy and to quit and deliver vacant possession of the 12th floor demised premises on or before 1 October 2011;

(b) the one month notice to quit was unfairly and unreasonably short and was thereby invalid and ineffective;

(c) hence, by its letter dated 26 August 2011 to the plaintiff, the first defendant agreed to the determination of the 12th floor tenancy, as no concluded agreement was reached between the plaintiff and the defendants as to the renewal of the 11th, 12th and 14th floor tenancies, but sought a fair and reasonable period to quit and deliver vacant possession of the 12th demised premises; and

(d) the first defendant admits that it continued to be in possession of the 12th floor demised premises until 31 October 2011, but contends and will contend that it was lawfully entitled to do so.

[20] In addition, the first defendant denies that:

(a) the 12th floor tenancy expired on 31 March 2009;

(b) it had willfully or contumaciously held over the 12th floor demised premises and kept the plaintiff out of possession thereof;

(c) it had refused or neglected or otherwise failed to quit and deliver up vacant possession of the demised premises;

(d) it is therefore liable to the plaintiff for double value or rent; and

(e) even if the first defendant is liable for double value the first defendant denies that the prevailing market rental of the demised premises was RM7.50 per sqft.

[21] Further, in so far as the plaintiff's claim against the first defendant in respect of both the 11th and 12th floor demised premises is concerned, the first defendant contends that:

(a) it was at all material times impliedly agreed by the plaintiff and the defendants that the rate of rent to be applied to the demised premises' would be the fair market rent prevailing at the material time;

(b) the plaintiff had unjustifiably and unreasonably insisted on a rate of rental at RM7.50 per sqft;

(c) the plaintiff's proposed rate of rent at RM7.50 per sqft was excessive or unsubstantiated;

(d) whereas, the defendants had counter proposed a rate of rental at RM5.50 per sqft, which was based upon a market survey carried out by Messrs Ooi & Zaharin Sdn Bhd (Bundle B2 (Tab 73));

(e) the plaintiff's claim herein, in particular, the plaintiff's claim for double rent is in all the circumstances an unconscionable claim and the plaintiff is thereby estopped from maintaining its claim herein and/or is not entitled to any relief claimed; and

(f) in any event, there is no contractual or statutory basis for the plaintiff's claim herein.

The first defendants' counterclaim

[22] The first defendant's counterclaim is for the refund of the deposits paid for the 11th and 12th floor tenancies. Although there was initially some dispute between the plaintiff and the defendants as to the actual amounts of these deposits, the first defendant has, to simplify matters, accepted the amounts as stated by the plaintiff (please refer to Q&A No 14 of DWS2) that is:

(a) for the 11th floor — RM102,024; and

(b) for the 12th floor — RM102,244.50.

It is common ground that the plaintiff has not refunded the aforesaid amounts to the first defendant and seeks to offset against the damages claimed.

The plaintiff's claim against the second defendant

[23] The plaintiff alleges in its re-amended statement of claim that it is expressly or impliedly agreed between the plaintiff and the second defendant that the parties are bound by the terms contained in an unsigned formal tenancy in respect of the 14th floor demised premises.

[24] The plaintiff therefore, claims for double the prevailing market rental of RM7.50 per sqft or alternatively, double the monthly rental of RM100,401.40 at the expiry of the 14th floor premise pursuant to cl 7.47 (failure to yield up) of the formal tenancy and/or s 28(4)(a) of the Civil Law Act 1956 ('the CLA').

[25] The plaintiff also claims loss of income arising from the delay in re-letting the demised premise at RM7.50 per sqft for November 2011 amounting to RM145,650 or alternatively RM100,401.40 pursuant to cl 7.46 (restoration) of the formal tenancy and damages of increased electricity tariff by TNB in June 2011 in the sum of RM3,884.

[26] The plaintiff claims RM1,827,796.87 as at 31 January 2012 (with continuing interest) (annexure 2(a) to the re-amended statement of claim ('RASOC')) or in the alternative RM904,834.34 as at 31 January 2012 (with continuing interest (annexure 2(b) to the RASOC).

[27] In respect of the 12th floor tenancy, the plaintiff in its re-amended statement of claim raised the provisions under the 12th floor tenancy agreement and alleged that the second defendant is jointly and severally liable with the first defendant for the double rental of RM5,384,419.06 as at 31 January 2012 or alternatively double value of rental of RM3,425,413.94 as at 31 January 2012 pursuant to cl 8.43 of the 12th floor tenancy agreement and/or s 28(4)(a) of the CLA.

[28] The plaintiff also claims loss of income arising from the delay in re-letting the demised premise at RM7.50 per sqft for November 2011 amounting to RM112,050 or alternatively RM86,203.80 (RM5.77 per sqft) pursuant to cl 8.41 (restoration) of the 12th floor tenancy agreement and damages of increased electricity tariff by TNB in June 2011 in the sum of RM7,470.

[29] The plaintiff claims RM5,488,929.80 as at 31 January 2012 (with continuing interest) (annexure 3(a) to the RASOC) or in the alternative for RM3,529,924.69 as at 31 January 2012 (with continuing interest) (annexure 3(b) to the RASOC).

The second defendant's defence

[30] As for the plaintiff's claim in respect of the 14th floor tenancy, the second defendant contends that the claim in contract fails as:

(a) the 14th floor tenancy agreement ('formal agreement') was never agreed to and executed. The second defendant avers that:

(i) the agreement for the tenancy agreement for the 14th floor was contained in the plaintiff's offer letter of 20 October 2007 (B1/23) and the second defendant's acceptance letter of 23 November 2007 (B1/24) ('exchange of letters');

(ii) the letter of 20 October 2007 (B1/23) at Item 3.0 contains the express term that on renewal the rental will be based on the then

prevailing market rental of Rohas Perkasa. The letter of 23 November 2007 (B1/24) at Item 3.0 contains the express term that the renewal is to be at a mutually agreed market prevailing rental rate; and

(iii) the contractual provisions being relied on by the plaintiff namely cl 7.46 (restoration) and cl 7.47 (failure to yield up) in the formal agreement did not form part of the agreement between the plaintiff and the second defendant.

[31] The second defendant further contends that even if the court finds that the formal agreement binds the parties:

(a) there was no breach of cl 7.47 (failure to yield up) as there was 'no failure, neglect or refusal to yield up' on part of the second defendant as required by the clause; and/or

(b) on a proper construction of the formal agreement, taking into account the relevant facts leading to its formation, in particular the exchange of letters, on renewal the rental will be based on the then prevailing market rate of Rohas Perkasa. Therefore, the second defendant contends that the plaintiff cannot unreasonably insist on a rental significantly above this market rate and thereafter benefit from its own wrong to impose double rent pursuant to cl 7.47 (failure to yield up); and/or

(c) it is necessarily implied that the rate of rental to be applied on any further tenancy would be the prevailing market rate at the material time, and the plaintiff's right to claim double rental and/or double value under cl 7.47 (failure to yield up) is subject to and conditional upon the plaintiffs observance of the above said implied agreement, as it cannot benefit from its own wrong in law; and/or

(d) cl 7.47 (failure to yield up) is a penal clause that is caught by s 75 of the Contracts Act 1950. The plaintiffs failure to tender any evidence to prove actual damage as required under Malaysian Law renders cl 7.47 (failure to yield up) in effect unenforceable against the second defendant; and/or

(e) cl 7.46 (restoration) is not enforceable as the failure of re-letting the 14th floor premise has no causal link with the second defendant's alleged late hand over.

[32] As for the plaintiff's claim in respect of the 12th floor tenancy, the second defendant contends that the claim in contract fails as:

(a) it no longer bound the second defendant after the second defendant vacated the 12th floor and moved up to the 14th floor on or about 12 February 2008 with the plaintiff's agreement and consent; and

(b) alternatively, if the court finds that it did bind the second defendant after this date:

(i) there was no failure to yield up as required by cl 8.43 (failure to yield up); and/or

(ii) it is necessarily implied that the rate of rental to be applied on any further tenancy would be the prevailing market rate at the material time, and the plaintiff's right to claim double rental and/or double value under cl 8.43 (failure to yield up) is subject to and conditional upon the plaintiff's observance of the above said implied agreement, as it cannot benefit from its own wrong in law; and/or

(iii) cl 8.43 (failure to yield up) is a penal clause that is caught by s 75 of the Contracts Act 1950. The plaintiff's failure to tender any evidence to prove actual damage as required under Malaysian Law renders cl 8.43 (failure to yield up) in effect unenforceable against the second defendant; and/or

(iv) cl 8.41 (restoration) is not enforceable for the reasons as the second defendant was not in occupation of the 12th floor premise and the failure of re-letting the 12th floor premise has no causal link with the first defendant's alleged late hand over.

[33] As for the plaintiff's claim based on s 28(4)(a) of the Civil Law Act 1956 ('the CLA') for the 14th and 12th floors, the second defendant avers that it is not statutorily liable to pay double rent as the plaintiff failed to prove on a balance of probabilities that there was wilful and contumacious holding over on part of the second defendant.

The second defendant's counterclaim

[34] The second defendant's counterclaim is for the refund of the deposits paid for the 14th floor tenancy. Although there was initially some dispute between the plaintiff and the second defendant as to the actual amounts of the deposit, the first defendant has, to simplify matters, accepted the amounts as stated by the plaintiff that is RM322,400.

It is common ground that the plaintiff has not refunded the aforesaid amounts to the second defendant and seeks to offset against the damages claimed.

ISSUE 1: THE CLAIM FOR DOUBLE VALUE OR RENT PURSUANT TO S 28(4)(a) OF THE CIVIL LAW ACT 1956

[35] I will deal with the plaintiffs alleged claim for double value or rent pursuant to s 28(4)(a) of the Civil Law Act 1956 before dealing with the plaintiffs alleged claim for double value or rent pursuant to section 8.43 of the

11th floor tenancy agreement. I have taken this approach, as it is reasonable to assume that contracting parties would have entered into the contract taking into account the general law that governs contractual relationship. According to Lewison on *The Interpretation of Contracts* (2004 Ed) at p 185:

> Parties do not make contracts in a vacuum. They always negotiate against the background of the law. It is therefore, reasonable to suppose that they take into account the general law in reaching their ultimate consensus. And, accordingly, the proper interpretation of their agreement is properly influenced by the legal background against which it is made.

See also *Bank of Credit and Commerce International SA v Ali and others* [2002] 1 AC 251 at p 269 per Lord Hoffmann.

[36] This principle has been adopted and followed by our courts in *Basnol Abol & Ors v The State Government of Sarawak & other appeals* [2004] 2 CLJ 553 (FC) per Abdul Malek Ahmad FCJ (delivering the judgment of the court) affirming the decision of the Court of Appeal in *Kerajaan Negeri Sarawak & Ors v Basnol bin Abol (deceased) & Ors and other appeals* [2003] 1 MLJ 376 at p 385 per Mohd Noor Ahmad JCA (delivering the judgment of the court), which referred to and quoted with approval the same passage from Lewison's *Interpretation of Contracts* quoted above, but from an earlier edition. Please refer as well to *HSBC Bank (M) Bhd v Wui Ling Timber (Bintulu) Sdn Bhd & Anor* [2000] 8 CLJ 197 at p 202 per Ian Chin J.

[37] In the present case, it is obvious that the relevant legal background or context for section 8.43 (the failure to yield-up and the right to double rental clause) of the 11th floor tenancy agreement (mutatis mutandis the 12th floor tenancy agreement) was s 28(4)(a) of the Civil Law Act 1956. Accordingly, it is reasonable to suppose that the meaning of section 8.43 of the 11th and 12th floor tenancy agreements must take its colour from the meaning of s 28(4)(a) of the Civil Law Act 1956.

[38] Hence, to determine whether there was a breach of section 8.43 of the 11th floor tenancy agreement (and if applicable the 12th floor tenancy agreement), it would be necessary to first determine the meaning and effect of 'holding over' in s 28(4)(a) of the Civil Law Act 1956 which stipulates that:

> Every tenant *holding over* after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

[39] Section 28(4)(a) has been considered and applied in numerous cases and has acquired a well established meaning through case precedent. At the outset it should be pointed out that s 28(4)(a) is a penal provision: *Krishna*

Sreedhara Panicka v Chiam Soh Yong Realty Co Ltd [1983] 1 MLJ 65 per Lee Hun Hoe CJ (Borneo) (Yusoff Mohamed J concurring, Wan Suleiman FJ dissenting). In that case, Lee Hun Hoe CJ (Borneo), delivering the majority judgment of the Federal Court at p 67, described the phrase 'double the amount of his rent' in s 28(4)(a) as follows:

> The respondents claim is actually not rent but a penal sum which the former tenant has to pay for the inconvenience and loss he causes the landlord in refusing to give vacant possession of the premises on the determination of the tenancy.

[40] Being a penal provision, s 28(4)(a) must necessarily be construed with some degree of stricture: *Krishna Sreedhara Panicka* at p 67. Our courts have consistently held that s 28(4)(a) confers a discretion whether to impose double value/rent or not: *Krishna Sreedhara Panicka* at p 67 and *Soong Ah Chow & Anor v Lai Kok Cheng* [1986] 1 MLJ 42 at p 43 per Hashim Yeop Sani FCJ (delivering the judgment of the court). In *Soong Ah Chow* at p 43, Hashim Yeop Sani FCJ said:

> Section 28(4)(a) of the Civil Law Act 1956 provides that every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double rental until possession is given up by him. The effect of s 28(4) was examined in *Krishna Sreedhara Panicka v Chiam Soh Yong Realty Co Ltd* [1983] 1 MLJ 65. The majority judgment held the view that the court has a discretion when to impose double rent. It seems to me that the legislature's choice of the words 'shall be chargeable' clearly implies some discretion.

[41] Thus, I agree with submissions of learned counsel for the second defendant that the phrase 'shall be chargeable' in sub-s (4)(a) is merely an enabling one and the recovery of double rent under sub-s 4(a) is accordingly not automatic or as of right for the landlord but a matter of the court's discretion. See *Mari Boutique Sdn Bhd v Jaya Jusco Stores Bhd* [2004] 1 MLJ 74 at p 82 per Abdull Hamid Embong J.

[42] *Krishna Sreedhara Panicka* is also authority for a further proposition ie that there must be something in the nature of willful conduct or contumacy on the part of the tenant in holding over to render him liable to double value. This can be seen from the reference made by Lee Hun Hoe CJ in *Krishna Sreedhara Panicka* at p 68 to *Crook v Whitbread* 88 LJKB 959 at p 961 and from the ensuing passage where Lee Hun Hoe CJ (Borneo) said at p 68:

> Although the provisions of s 28(4)(a) of the Civil Law Act may not be the same as the provisions of the Landlord and Tenant Act 1730, *Crook v Whitbread* does support the view of the learned judge, that is, to avoid double rent if the tenant's conduct in holding over the premises has been unreasonable.

[43] On the other hand, the minority, Wan Suleiman FCJ, at p 68 said that there was no discretion on the part of the court in s 28(4)(a) of the CLA and

that 'at the option of the landlord', the court would award the double rent from the expiry of the notice to quit. He further said that there was no requirement to establish 'contumacy' on the part of the tenant for the recovery of double rent as found in *Crook*'s case.

[44] In *Wee Tiang Yap v Chan Chan Brothers* [1986] 1 MLJ 47 the Federal Court comprising Wan Suleiman, Seah and Hashim Yeop A Sani FCJJ had another opportunity to look at the meaning of 'holding over' in s 28(4)(a).

Wan Suleiman FCJ, who was of course the minority in *Krishna Sreedhara Panicka*, delivered the main judgment. In respect of the claim for double rental, after referring to s 28(4)(a) of the CLA, Wan Suleiman FCJ said at p 49 as follows:

> Our attention has also been drawn to the decision of this court in *Krishna Sreedhara Panicka v Chiam Soh Yong Realty Co Ltd* ... in particular the dissenting judgment therein.
>
> We note that the majority judgment was based on an English authority *Crook v Whitbread* ... Under section 1 of the English Landlord and Tenant Act 1730 doing 'wilfully' is a requirement. Our section does not contain that requirement. However, on the facts of the case in the present appeal, even if a wilful act is required, the respondents had wilfully remained on the premises after expiry of the period of notice.

On the strength of this pronouncement, learned counsel for the plaintiff submits that the Federal Court had effectively decided that there was no requirement in law to prove contumacious or wilful holding over on the part of the tenant in order for the landlord to recover the double rental, thus departing from the majority view in *Krishna Sreedhara Panicka*. However, I am, with respect, unable to accept that contention. There is no express overruling of the majority decision in *Krishna Sreedhara Panicka* in *Wee Tiang Yap*.

[45] Further, the plaintiff's contention that the law as it now stands is uncertain on this point as a result of the supposed conflicting decisions of the Federal Court in *Krishna Sreedhara Panicka* and *Wee Tiang Yap* is also plainly wrong. In actual fact there is no such conflict as was pointed out by Denis Ong JCA (delivering the judgment of the Court of Appeal) in *Eight Development (M) Sdn Bhd v Antara Steel Mills Sdn Bhd* [2004] 2 CLJ 32 at p 45 where the learned judge said:

> ... [t]hese pronouncements of the majority of the Federal Court (ie in *Krishna Sreedhara Panicka*) were consistently adhered to in *Wee Tiang Yap v Chan Chan Brothers* [1984] 1 CLJ 56.

[46] Furthermore, whilst Wan Suleiman FCJ may have had reservations about the correctness of the majority judgment in *Krishna Sreedhara Panicka* as to the requirement of a willful and contumacious holding over on the part of

A the tenant, the point remains — and this cannot be over emphasised — that Wan Suleiman FCJ actually applied the majority judgment in *Krishna Sreedhara Panicka* to the facts in *Wee Tiang Yap*. It is therefore plainly wrong for the plaintiff to contend that the decisions of the Federal Court in *Krishna Sreedhara Panicka* and *Wee Tiang Yap* are in conflict. A conflict would only arise B if the Federal Court in *Wee Tiang Yap* departed from and refused to apply the majority judgment in *Krishna Sreedhara Panicka* to the facts in *Wee Tiang Yap*. But, that is not what happened in *Wee Tiang Yap*.

C **[47]** Additionally, Wan Suleiman FCJ's judgment in *Wee Tiang Yap* must be looked at in its proper context. Wan Suleiman FCJ's judgment was not the judgment of the Federal Court in *Wee Tiang Yap*. The other members of the Federal Court, namely, Seah FCJ and Hashim Yeop Sani FCJ delivered separate judgments. Although, Seah FCJ and Hashim Yeop Sani FCJ both concurred D with Wan Suleiman FCJ's conclusion that the appeal should be allowed, neither Seah FCJ nor Hashim Yeop Sani FCJ expressed a view on the effect of s 28(4)(a) or the majority judgment in *Krishna Sreedhara Panicka*. In other words, both Seah FCJ and Hashim Yeop Sani FCJ arrived at the same conclusion but through another route. Indeed, very soon after *Wee Tiang Yap* E was decided, Hashim Yeop Sani FCJ delivered the judgment of the Federal Court in *Soong Ah Chow* in which His Lordship referred to and applied the majority judgment in *Krishna Sreedhara Panicka*.

[48] Thus, even if there was any confusion as to whether the Federal Court F in *Wee Tiang Yap* had departed from the majority view in *Krishna Sreedhara Panicka* as contended by learned counsel for the plaintiff, the Federal Court in *Soong Ah Chow & Anor* had laid that issue to rest, where Hashim Yeop Sani FCJ in delivering the unanimous decision of the court held at p 43 that:

> G It seems to me that the Legislature's choice of the words 'shall be chargeable' clearly implies some discretion. But a more difficult question is the extent of the discretion. In *Panicka*'s case the trial judge had found that the parties had come to some sort of understanding and considered it to be unconscionable for the respondents to claim double rent from the expiry of the notice. The majority judgment saw no reason to interfere with the exercise of this discretion.

H

[49] In any event, even if there is a conflict in the decisions of the Federal Court in *Krishna Sreedhara Panicka* and *Wee Tiang Yap* there is no dispute that the Federal Court in *Soong Ah Chow* did apply and follow the majority judgment in *Krishna Sreedhara Panicka*. Based on that fact, even if the alleged I conflict exists, this court must apply the later decision of the Federal Court in *Soong Ah Chow*. That this would be the correct approach for this court to take can be seen from the decision of the Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 per Peh Swee Chin FCJ (delivering the judgment of the court) held at p 14 that:

> If the House of Lords, and by analogy, the Federal Court departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

[50] Therefore, based on these high authorities, I agree with submissions of counsel for the second defendant that it is a requirement under s 28(4)(a) that there must be a willful or contumacious holding over on the part of the tenant in order for the landlord to claim double value/rent. This is also clear from *Crook v Whitbread* at p 961 that:

> ... the use of the word 'willfully' meant 'willfully and contumaciously', and not merely by mistake or under a fair claim of right ...

[51] In this regard, it may be useful to consider as persuasive the position adopted by the Singapore Courts. The requirement that there should be willful or contumacious holding over on the part of the tenant is also a requirement under the equivalent statutory provision in Singapore. In Singapore, an action for recovery of double rent and/or double value is now contained in s 28(4) of the Civil Law Act (Revised Edition 1999) (formerly s 19(4) (Cap 43, 1988 Ed): s 28(4) (as the case with s 19(4)) is in pari materia with s 28(4)(a) of the Civil Law Act 1956 and reads as follows:

> Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of this landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether or not notice to that effect has been given or not.

Section 19(4) of the Civil Law Act (Cap 43, 1988 Ed) was considered by the Singapore Court of Appeal in *Lee Wah Bank Ltd v Afro-Asia Shipping Co (Pte) Ltd* [1992] 2 SLR 93 per Yong Pung How CJ (delivering the judgment of the court) held at p 744 that:

> The expression 'holding over' in s 19(4) of the Act requires an intention on the part of the tenant to refuse to deliver up the demised premises with knowledge that he has no right to remain in possession.

Thus connoting wilful and contumacious conduct. The case of *Lee Wah Bank Ltd* was referred to and followed in Malaysia in the case of *Tay Lai Kiang & Ors v Public Bank Bhd* [1996] MLJU 426 at p 19 per Abdul Malik Ishak J and in the case of *KBB Properties Sdn Bhd v Yong Chon Chiang* [2006] 6 CLJ 421 at pp 428–429 per Rosnaini Saub JC.

[52] The plaintiff's case from its pleadings and submissions of counsel is that the mere fact of holding over of the respective demised premises should result in liability for double of the alleged prevailing market rent of RM7.50 per sqft,

A or alternatively, for double of the respective monthly rent at the expiries of the 11th, 12th and 14th floor tenancy agreements. The plaintiff's stand is that there is no requirement in law to establish that the holding over by the defendants was willful or contumacious before the plaintiff is entitled to claim for double the value or rent during the alleged holding over of the respective
B demised premises.

[53] I agree with submissions of counsel for the defendants, that, that stand by the plaintiff is plainly wrong and is untenable in the light of the cases
C referred to above and the principles of law adopted therein.

[54] Hence, I agree with submissions of learned counsel for the first defendant that the effect of s 28(4)(a) is that there must be something more than mere holding over after the tenancy has expired or been determined.
D There must be present — over and above that — wilful conduct or intent or contumacy on the part of the tenant in holding over the demised premises after the tenancy has expired or determined. There must in other words be present an intention or conduct on the part of the tenant to refuse to deliver up the demised premises or to prevent the landlord from obtaining possession of the
E demised premises after the tenancy has expired or been determined with knowledge that he (ie the tenant) has no right to remain in possession thereof. The burden of proof lies on the landlord (the plaintiff) to show that the tenant (the defendants) had continued to exercise a degree of possession and control over the demised premises that prevented the landlord from taking possession
F of the demised premises after the expiration or determination of the tenancy.

ISSUE 2: WHETHER THE DEFENDANTS WERE HOLDING OVER THE DEMISED PREMISES WILFULLY OR CONTUMACIOUS

G **[55]** Now I move on to consider the issue of whether, based on the evidence presented, the defendants had wilfully and contumaciously held over the demised premises. In doing so, it would be an opportune time to consider the tenancy status of the 12th floor demised premises first — ie whether the first
H defendant took over the 12th floor tenancy from the second defendant. The answer to this question would throw some light on the issue of whether the first defendant had acted contumaciously in staying on at the 12th floor demised premises.

I **[56]** The second defendant had been occupying the 12th floor demised premises pursuant to the terms of a tenancy agreement. It is common ground that the second defendant, with the consent of the plaintiff, vacated the 12th floor demised premises on 1 February 2008 and the first defendant then moved into the said premises in April 2008.

[57] The plaintiff's contention is that the 12th floor tenancy agreement was accordingly taken over by the 1st defendant for its remaining duration ie until its expiry on 31 March 2009. The plaintiff alleges that the 12th floor tenancy agreement was thereby transferred or novated to the 1st defendant. Alternatively, the plaintiff alleges that there was an assignment of the rights and benefits of the 12th floor tenancy agreement by the second defendant to the first defendant.

[58] The defendants dispute that contention and state that the 12th floor tenancy agreement was discharged when the second defendant vacated the 12th floor demised premises with the consent of the plaintiff. The defendants further contend that the 12th floor demised premises was then let to the first defendant on a monthly tenancy at a monthly rental of RM82,170 commencing from April 2008.

[59] The issue or question then is whether there was a novation of the 12th floor tenancy agreement or an assignment of the rights and benefits there under from the second defendant to the first defendant. This is essentially a question of fact. The burden of proof lies on the plaintiff and an objective approach is to be applied in construing this issue: *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 at p 764 per Edgar Joseph Jr SCJ (delivering the judgment of the court).

[60] Learned counsel for the first defendant submits that a novation has been defined to mean an act whereby, with the consent of all parties, a new contract is substituted for an existing contract and the latter is discharged. A novation extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration and rights and obligations under it are not those transferred from the old contract which is already extinguished: *LYL Hooker Sdn Bhd v Tevanaigam Savisthri & Anor* [1987] 2 MLJ 52 at p 53 per Saileh Abbas LP (delivering the judgment of the court).

[61] Whether or not there is a novation of a contract and the intention to do is a fact which must clearly be proved: *Housing and Development Board v Lee Sem Yoong Sdn Bhd* [1987] 2 MLJ 204 per Syed Agil Barakbah SCJ (delivering the judgment of the court).

[62] Looking at the facts in this case there was indeed an extinguishment of the second defendant's rights and obligations under the 12th floor tenancy agreement when the second defendant, with the plaintiff's consent, vacated the 12th floor demised premises on 1 February 2008. This is evident from the fact that the second defendant ceased to occupy and remain in possession of the 12th floor demised premises on 1 February 2008 and from that date the

plaintiff ceased to invoice the second defendant for the monthly rent for the 12th floor demised premises. The first defendant assumed the obligation to pay the monthly rent for the 12th floor demised premises with effect from April 2008 when the first defendant moved into the 12th floor demised premises. But, apart from that, there is nothing to show any consideration moving between the parties, which is a vital requirement for a novation.

[63] Furthermore, the contemporaneous documentary evidence between January 2008–April 2009 in actual fact shows that the intention of the parties, or at least of the defendants, was that the parties would enter into a new tenancy agreement for the 12th floor demised premises. There is nothing in these documents that shows that the intention or understanding between the parties was that the first defendant would take over the 12th floor tenancy agreement from the second defendant.

[64] The contemporaneous correspondence in February 2008 also shows that the intention of the parties, was that the parties would enter into a new tenancy agreement for the 12th floor demised premises. This can be seen from Bobbi Choo's email to Muhd Mawardi dated 14 February 2008 (approximately two weeks after the second defendant moved out of the 12th floor demised premises) which states as follows:

> Dear En Mawardi
>
> This is confirm our phone conversation of this morning:
>
> · Tenancy agmt for 14/f under WFT Solutions Sdn Bhd — 19420 sf @ RM5.00psf
>
> · Tenancy agmt for 12/F to be aligned to be the same as 14F but signed under WFT Msia
>
> · Taking up of the balance space on 12/F wef 1 May or latest 1 June — rental rate aligned as the same as current lease on 14F — to be signed under WFT Msia — 1 1/2 month rent free given for renovation works on the additional space.

Despite Bobby Choo's and Muhd Mawardi's oral testimony to the contrary, there is nothing in the contemporaneous correspondence that shows that the intention or understanding between the parties was that the first defendant would take over the 12th floor tenancy agreement from the second defendant. In this regard, I would prefer to accept the contemporaneous documentary evidence in place of the oral evidence of the witnesses.

[65] There is one other factor that indicates that there was no take over of the 12th floor tenancy agreement by the first defendant. Now, if the 12th floor tenancy agreement had indeed been taken over by the first defendant, as alleged by the plaintiff, then March 2009 ought to have been a rent free month. Yet, it can been seen from the plaintiff's own documents that the first defendant was

invoiced for the monthly rent for the 12th floor demised premises for March 2009 and that the first defendant then made payment in respect thereof.

[66] I find that all these facts clearly affirm the defendants' case and are plainly irreconcilable with the plaintiff's case. There can be no doubt that the contemporary documentary evidence should be preferred to the unconvincing explanation given by the plaintiff's witnesses at the trial as to the alleged novation. There are several authorities from which support may be drawn for such an approach. It would suffice to quote from one of them: *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 per Chang Min Tat FCJ (delivering the judgment of the court). In *Tindok Besar Estate Sdn Bhd* Chang Min Tat FCJ said (at p 234):

> Nevertheless, the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witness and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial perception of the evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[67] In the premise of the foregoing, I find that the plaintiff has failed to establish that there was a novation of the 12th floor tenancy agreement by the second defendant to the first defendant. Likewise, I find that the plaintiff has failed to establish that there was an assignment of the rights and benefits under the 12th floor tenancy agreement from the second defendant to the first defendant, as the only inference to be drawn from the fact that the plaintiff had ceased invoicing the second defendant for the monthly rent for the 12th floor demised premises from February 2008 is that the second defendant's contractual liabilities under the 12th floor tenancy agreement had been extinguished.

[68] It is trite that contractual liabilities are incapable of being assigned. In the words of Collins MR in *Toihurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at p 668:

> It is, I think quite dear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractor. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to somebody else; this can only be brought about by the consent of all three, and involves the release of the original debtor.

In the absence of any cogent evidence to the contrary, the only conclusion consistent with the extinguishment of the second defendant's contractual rights and liability under the 12th floor tenancy agreement is that the 12th floor tenancy agreement was discharged on 1 February 2008. That being the case, it must follow from this analysis that insofar as the 12th floor demised premises is concerned, the plaintiff's contractual claims against the first defendant, based as they are purportedly on the flawed premise that the 12th floor tenancy agreement was taken over by the first defendant, must necessarily fail.

[69] All that remains then of the plaintiff's claim as far as the 12th floor demised premises is concerned, is the plaintiff's alleged claim for double value or rent pursuant to s 28(4)(a), which I will address next in combination with the plaintiff's claim for double value or rent pursuant to that same section in respect of the 11th and 14th floor demised premises.

[70] The defendants contend that the contractual and statutory claims for double value or rent are basically one and the same in as much as the respective claims are based on or require proof of the same essential elements ie wilful or contumacious refusal to yield up possession.

[71] Now, in so far as the 12th floor demised premises is concerned, the contractual claim for holding over of the 12th floor demised premises must surely fail in the light of my earlier finding that the 12th floor tenancy agreement was discharged on 1 February 2008 and that the 12th floor demised premises was then let to the first defendant on a monthly tenancy at a monthly rental of RM82,170 commencing from April 2008. The plaintiff did give a one month's notice in its letter dated 19 August 2011 to the first defendant to quit and deliver vacant possession of the 12th floor. However, I find that, that period of one month for a large commercial tenant to quit and deliver business premises is unreasonable. My view in this regard is supported by the pronouncement of the Court of Appeal in *JR Lincks Educational Consultants Sdn Bhd v Goh & Sons Enterprise Sdn Bhd* [2008] 3 CLJ 815 where KN Segara JCA (delivering the judgment of the court) said at p 840 that:

> ... In our view, any valid notice to terminate a fixed term tenancy of business premises in order to be sufficient and reasonable in the absence of any express and unambiguous term in the agreement, shall be not less than three months ...

[72] There is no reason why that principle of sufficient and reasonable notice should not apply in the same way to a monthly period business tenancy. Consequently, the one month's notice to quit was clearly unfair and unreasonable and the said notice was thereby invalid and ineffective in law. This, in fact, is consistent with the concession made by the plaintiff's main

witness PW1 that even two months is too short a notice for the defendants to move out and that a reasonable time frame ought to be six months.

[73] Now, even if the 12th floor tenancy agreement was taken over by the first defendant for its remaining term until 31 March 2009, the question that needs to be answered in this case is whether on the evidence adduced at the trial, there was willful and contumacious holding over by the first defendant of the demised premises upon termination of that tenancy? My answer to that question, for reasons discussed below, is that the holding over of the 12th floor demised premises was not willful or contumacious and cannot therefore fall within the requirements of s 28(4)(a). Similarly, for the same reasons, I also find that the holding over of the 11th and 14th floor demised premises were also not willful or contumacious.

[74] Insofar as the 11th and 14th floor demised premises are concerned it is not disputed that until the defendants received the plaintiff's letter dated 19 August 2011 giving the defendants notice to determine the 11th and 14th floor tenancies and to quit and deliver vacant possession of the 11th and 14th floor demised premises on or before 1 October 2011, there was no notice or request by the plaintiff to vacate these demised premises after the expiry of the respective tenancy agreements. The defendants had delivered vacant possession of the 11th and 14th floor demised premises back to the plaintiff on 31 October 2011 ie within a fair and reasonable time from the receipt of the notice.

[75] The evidence shows that the plaintiff had after expiry of the 11th, 12th and 14th floor tenancy agreements and prior to the issuance of the letters dated 19 August 2011, consented to the defendants continuing to occupy and remain in possession of the 11th, 12th and 14th floor demised premises, pending negotiations between the parties for fresh tenancies to be agreed. During this period the defendant had continued paying the prevailing monthly rent for the respective demised premises (including monthly service charges), which the plaintiff had accepted.

[76] I agree with submissions of learned counsel for the defendants that on a proper application of s 28(4)(a) (ie in accordance with the principles referred to above), the plaintiff — upon whom the burden of proof lies — has to show that the defendants had wilfully or contumaciously held over the respective demised premises and kept the plaintiff out of possession thereof. However, having combed the evidence, I do not find any evidence to support the plaintiff's alleged claim of the defendants' willful and/or contumacious holding over of the demised premises. Thus, i find that the plaintiff has failed to discharge the legal burden to show that the defendants had:

A (a) willfully or contumaciously held over the respective demised premises; and/or

(b) failed, refused or neglected to yield up the respective demised premises; and/or

B (c) kept the plaintiff out of possession thereof.

It may be helpful in this regard to point out that it can be seen from the cases where double value or rent was awarded, that the following facts must be present:

C (i) a notice or request by the landlord to the tenant to vacate the premises upon the expiry or determination of the tenancy. And notwithstanding the expiry or the determination of the tenancy, the tenant continues or persists to wilfully occupy or remain on the premises; and

D (ii) non-payment of rent by the tenant or alternatively all tenders of rent by the tenant are refused by the landlord, but the tenant continues or persists to wilfully occupy or remain on the premises after the expiry or determination of the tenancy notwithstanding the landlord's notice or request to vacate the premises.

E

[77] In so far as contumacy is concerned, the plaintiff's main thrust of complaint is that the defendants were not bona fide in their negotiations for fresh tenancies and that they never had a genuine desire to take on fresh tenancies and had dragged on the negotiations merely to buy time to F subsequently move out.

[78] The plaintiff's allegation of bad faith or mala fides in its negotiations against the defendants is made up of three elements ie that the defendants:

G (a) had no genuine desire to renew their tenancies;

(b) were lackadaisical about the renewal of the tenancies; and

(c) took advantage of the negotiations to hold over the respective demised premises.

H

[79] To succeed in these allegations the plaintiff must first establish as a matter of law that there was an affirmative or positive duty on the parties to negotiate in good faith. However, case authorities have established that there is in law no such duty.

I

[80] The English position is as follows. In the case of *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at p 439 per Bingham LJ, the English Court of Appeal held that the law of contract, does not as a matter of general principle, recognise an overriding duty of good faith. In the case of

Walford and Others v Miles and Another [1992] 2 AC 128 per Lord Ackner (with whom the other Law Lords agreed), it was held by the House of Lords that English law does not recognise a duty to negotiate in good faith. Indeed, in that case, Lord Ackner stated at p 138 that:

> ... the concept of a duty to carry on negotiations is inherently repugnant to the adversarial positions of the parties when involved in negotiations.

[81] Our Court of Appeal in a recent decision in the case of *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619 at p 666 per Abdul Malik Ishak JCA (delivering the judgment of the court), after referring, inter alia, to *Watford* held that:

> ... a 'breach of duty of good faith' is not a cause of action and there is no general duty of good faith in common law.

In our present case, at an earlier stage of the proceedings, VT Singham J in dismissing the plaintiff's discovery application (encl 97) held at p 16 of His Lordship's oral decision that:

> ... [a]s to the issue of good faith, which will determine the bona fide of the defendants in the negotiations as raised by the learned counsel for the plaintiff, for the documents to be ordered to be provided it is not a decisive factor under the rule 13 Order 24 in keeping with the principles of freedom of contract and binding force of contracts and is unworkable in practice. (*Walford and Others v Miles and Another* [1992] 2 AC 128, *Banque Keyer Uliman SA v Skandia (UK) Insurance Co Ltd* [1992] 1 QB 665 at p 773).

There being no appeal against that ruling by VT Singham J, that ruling must be adhered to and may not be reopened: *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 at pp 65–66 per Gopal Sri Ram JCA (delivering the judgment of the court).

[82] Though a contractual duty of good faith has been recognised in Malaysia in cases of employment contracts, joint ventures, insurance contracts and partnerships, it is clear from the authorities referred to above that the plaintiff and the defendants who were parties dealing at arm's length in respect of a commercial transaction plainly had no specific or general duty to negotiate with each other in good faith.

[83] Further, in the present case no expressly stipulated contractual obligation between the plaintiff and the defendants to negotiate in good faith exists. The absence of such an express term is highly significant as our Court of Appeal has decided — in *Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 5 MLJ 157 per Sulaiman Daud JCA — that in ordinary commercial contracts, a general duty of good faith will not be implied; it must be expressly provided for in the contract.

[84] In *Seven Seas Industries Sdn Bhd* the Court of Appeal was invited to conclude that the contract between the parties carried an implied obligation of good faith. In rejecting that invitation, Sulaiman Daud JCA observed at p 170 that:

> In our view the existence of the said obligation or duty again depend on the expressed intention of the parties which is to be ascertained from the terms of the contract, and on the nature of the relationship between the parties. It is a well established principle that where the terms of a contract are clear and free from ambiguity the court will not impose any implied terms ...

[85] Putting aside the legal question of the existence of a general duty to negotiate in good faith, there is still the question of whether the defendants had failed to act bona fide in their negotiations. The courts are well used to the notion of bona fide or its converse mala fide or bad faith. It has been said that bona fide is opposite to fraud. The equivalent of the phrase bona fide is 'honestly : see *The Queen v Holl and Others* (1881) 7 QBD 575. As a matter of illustration, the bona fide use of a trademark was held to mean '... honest use by the person of his own name, without any intention to deceive anybody': *Baume & Co Ltd v AH Moore Ltd* [1958] 2 All ER 113 at p 123 (CA). Conversely, bad faith was held to mean dishonesty, though not necessarily for a financial motive, and does not cover an honest, though mistaken taking into consideration of a factor which was in law irrelevant: *Cannock Chase District Council v Kelly* [1978] 1 All ER 152.

[86] The burden of proving this allegation obviously lies on the plaintiff. I have analysed the evidence and submissions of learned counsel for the plaintiff relating to this allegation and my findings are that there is a lack of cogent evidence showing that the defendants acted mala fide or in bad faith in their negotiations.

[87] It cannot be denied that the plaintiff had allowed the defendants to continue occupying the demised premised when the tenancies expired and collected monthly rental. It is also undeniable that the plaintiff and the defendants were in continuous negotiations to conclude fresh tenancies for the demised premises even before the tenancies expired and these negotiations continued on after expiry. It must be recognised that tenants and landlords of business premises are generally entitled to drive the best commercial deal for them. And in doing so, the parties could not settle on the monthly rental and tenure of the fresh tenancies, and the back and forth negotiations protracted on for various reasons. Now, if the plaintiff were dissatisfied with the pace and progress of negotiations, it would have been easy enough for the plaintiff to bring the negotiations to an end at any time subject of course to fair and reasonable notice being given. The plaintiff having given its consent to the defendants to continue occupying and remaining in possession of the demised

premises after expiry of the tenancies, cannot now be heard to complain of it because it now finds itself in a disadvantageous position.

[88] The plaintiff alleges that the defendants had no genuine desire to renew the said tenancies and were at any rate lackadaisical about the renewal of the tenancies. And that this was indicative of bad faith. However, I do not find the evidence being in accord with this suggestion. I find that in the beginning there were negotiations in earnest by the defendants, and there was some back and forth between parties on the rental rate and tenure. The evidence does show that at some stage, the negotiations became slow. This slow pace coincided with changes at the defendants' top management. This change in management personnel led to the defendants' new management wanting to take a more professional approach to the negotiations and to take independent professional advice from established property consultants. The defendants' new top management formed a team to handle the negotiations (as opposed to it being handled by Ms Bobbi Choo) and sought the independent professional advice of Knight Frank, an international firm of property consultants. I do not find anything sinister in this move. The defendants' new top management, comprising mainly of expatriates, were unfamiliar with the commercial rental market in Kuala Lumpur and they were well advised to seek independent professional advice. This makes perfect commercial sense and accords well with best practices of a large multinational corporation such as the defendants. And when the professional advice came, the opinion of Knight Frank was that the market rental for Rohas Perkasa was in the region of RM5.50 per sqft, as opposed to the plaintiffs insistence that the market rental was RM7.50 per sqft. There was a large rental gap between the parties.

[89] Mr Elvin Fernandez ('DW5') and Mr Sarkunan Subramaniam ('DW7') both of whom possessed the relevant and necessary competence as experts in the Malaysian property rental market gave cogent and compelling evidence to show that the plaintiffs asking rate of rent of RM7.50 per sqft was excessive and unjustifiable. The plaintiff's case that RM7.50 per sqft was the prevailing market rent at the material time was based very substantially if not entirely on the evidence of Hj Muhd Mawardi bin Hasan ('PW1') and Tan Sri Wan Azmi bin Wan Hamzah ('PW3'). I agree with submissions of counsel for the defendants that both PW1 and PW3 lacked the necessary expertise or competence to give evidence of the market value of the demised premises as they lacked the necessary qualification or expertise. Furthermore, they failed to support their opinion of the prevailing market rent by reference to the internal rate of rents within Rohas Perkasa or by reference to rate of rents in comparable buildings, as was done by the defendants' expert witnesses.

[90] In this case, the plaintiff failed to call expert witnesses of their own to substantiate their claim and in the absence of such expert evidence there is no

reason for this court to reject or not to accept the evidence of Mr Elvin Fernandez and to conclude that the plaintiff's asking rate of rent of RM7.50 per sqft was not the prevailing market rent but was instead excessive and unjustified: *Samundee Devan a/l Kerishnan Muthu v Public Prosecutor* [2009] 1 MLJ 697 at p 712 per Abdul Malik Ishak JCA (delivering the judgment of the court) and *Nancy Simon d/o SP Simon v Peninsular Park Sdn Bhd* [2008] 7 MLJ 625 at pp 631–632 per Mohd Hishamudin J.

[91] Further in a series of fairly recent decisions, starting with *Tay Lai Kiang & Ors v Public Bank Bhd* [1996] MLJU 426 at p 29; [1997] 5 CLJ 639 at p 652 per Abdul Malik Ishak J and more recently in *KFH Sjarah House (M) Sdn Bhd v Lembaga Kemajuan Wilayah Pulau Pinang* [2012] 3 MLJ 850 at p 868 per Chew Soo Ho JC, our courts have declined to accept the opinion of unqualified persons on market rent/value and have emphasised the desirability if not the necessity of leading evidence of market rent/value through a registered valuer or a qualified person. And I do not find any reason not follow the pronouncements of my learned brothers in these two cases.

[92] Therefore, having considered these factors, I do not find any substance in the plaintiff's allegation that the defendants were mala fide in their negotiations or that they had no genuine desire to renew the expired tenancies and that the negotiations were merely a ruse to seek time to move out to alternate premises.

[93] I now move on to consider the plaintiff's contention that they had in any event reserved their right to claim double rental if the negotiations came to naught. The plaintiff alleges that they had made it expressly or impliedly clear to the defendants that their right to claim for double value or rent of the respective demised premises during the holding over period was reserved by their letter dated 22 April 2009, email dated 10 November 2009, letter dated 6 September 2010, email dated 5 October 2010, letters dated 15 November 2010, 28 April 2011 and 2 June 2011 and in meetings between the representatives of the parties on 6 April 2011 and 6 May 2011. Now, it can be seen from these documents that the alleged right was said to arise under section 16.01 of the tenancy agreements. However, it is clear from the statement of claim that the plaintiff has abandoned section 16.01 as the purported basis for its claim for double value or rent. Instead, the plaintiff anchors its claim for double rental on the 'failure to yield-up' clause as in sections 8.43 and 7.47 of the respective agreements. That being the case, those documents ie the emails and minutes of meetings, referred to and relied on by the plaintiff to ground its claim for double rental, must cease to be of relevance, for at no time was the alleged right said to be based on section 8.43 or 7.47, as now claimed.

[94] The first time that section 8.43 or 7.47 was raised was in the plaintiff's re-amended statement of claim. Section 7.47, (the same as section 8.43) ie the 'failure to yield up' clause provides as follows:

> Without prejudice to any other right the Landlord may have against the Tenant, *if the Tenant fails or neglects or refuses to yield UP or to vacate the Demised Premises in accordance with the provisions in this agreement*, including clause 7.44, 7.45, 7.46 and 7.48, to pay to the Landlord as agreed liquidated damages a sum equivalent to double the amount of Monthly Rental or double the rental of the Demised Premises at the prevailing market rate, whichever shall be higher from the date of expiration or early determination of the tenancy hereby created to the date of actual delivery of vacant possession to the Landlord.

A plain reading of the above clause reveals that it can be invoked only in circumstances where there has been a failure, neglect or refusal on the part of the defendants to yield up the premises. Therefore, in order for any right to double rental arise, it is for the plaintiff to show in the first place that it has a proper legal basis for its claim for double value or rent by proving that there was wilful neglect or refusal to yield up the premises. The alleged right to claim cannot simply be found on a mere assertion thereof, as has been done by the plaintiff. That right must exist independently for the plaintiffs reservation to claim double value or rent to be of any effect at all.

[95] Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2006] 6 MLJ 544 at para 23(4) of p 556 in summarising the developments in the law relating to interpretation of contracts said:

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352; [1997] 2 WLR 945).

Similarly in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 per Gopal Sri Ram FCJ (as he then was) held as follows:

> When interpreting a private contract the court must not confine itself to the four corners of the document but also look at the factual matrix forming the background of the transaction, all material that was reasonably available to the parties, disregard any subjective intent and adopt an objective approach.

[96] In keeping with these rules of contractual interpretation, the expression 'failure to yield up' in section 8.43 or 7.47 must in the context and the surrounding circumstances of the present case refer to and mean a refusal to deliver up the premises with knowledge that the defendants have no right to remain in possession, and that the defendants had against the wishes of the plaintiff 'failed, neglected or refused' to yield up possession. It is evident that the plaintiffs contractual right to claim double rental under section 8.43 or 7.47 can only arise when there is wilful refusal to yield up the premises upon expiry of the tenancies. I find that there is simply no evidence tendered that establishes this threshold requirement of a failure, neglect or refusal to yield up the premises before the plaintiff can invoke this right to impose double rent. On the contrary, the evidence shows, that the plaintiff and the defendants intended for the defendants to stay on at the demised premises pending conclusion of negotiations on the terms of new tenancies, with no suggestion that the defendants were expected to vacate the premises on the expiry of the tenancies.

[97] The plaintiff further alleges that the defendants had unequivocally admitted to the fact of holding over of the respective demised premises and to liability for double value or rent by making a request for waiver of the double value or rent in the Messrs Ooi & Zaharin Sdn Bhd's (also known as Knight Frank Malaysia's) letter dated 12 May 2011 to the plaintiff. I am unable to accept that contention. When the contents of that letter is seen in the totality of the evidence, there is no unequivocal admission on the part of the defendants to pay double rental. Knight Frank wrote the letter of 12 May 2011 in the course of negotiations for the new tenancies, and in that Frank Knight was merely stating that any agreement for fresh tenancies would mean that the plaintiff would have to waive its asserted right to double rental, Mr Sarkunan Subramaniam ('DW7') author of the said letter dated 12 May 2011 put perspective to its content and denied this allegation. In Q&A No 17 of his supplementary witness statement, Mr Sarkunan Subramaniam said:

> I dispute that Knight Frank's (ie Ooi & Zaharin Sdn Bhd's) letter dated 13.5.2011 (it ought to be 12.5.2011) is an acceptance of liability for double rent or an admission of holding over. I should point out that Knight Frank's role was to assist the Defendants in the negotiations with the Plaintiff for the 'renewal: of the 11th, 12th and 14th floor tenancies at Rohas Perkasa. In any event, I am not legally trained and am in no position to accept or admit the same (which is denied).

In any event, if the plaintiff wished to impose double rental, then it ought to have demanded the defendants to yield up possession of the demised premises at the very expiry of the respective tenancies and notified the defendants that their continued possession of the demised premises post-expiry would be at double the rental and that any continued possession whilst negotiating would be construed as a failure to yield up possession. The plaintiff cannot unilaterally invoke the contractual stipulation for double rental in the midst of negotiations

as a means to exert pressure on the defendants to conclude the negotiations upon terms that the defendants may not wish to enter into. The plaintiff should give reasonable notice to the defendants to vacate the demised premises during this period of negotiations if the plaintiff was of the view that the negotiations were not proceeding to a quick end or that it was disadvantageous to the plaintiff. And if the defendants had failed to yield up possession thereafter then the plaintiff would have been entitled to double rental. The fact that during the course of negotiations the plaintiff continued to accept the prevailing monthly rental for the demised premises based on the rates in the expired tenancies further demolishes the plaintiffs contention that it had reserved its rights to double rental.

[98] In the premise of the foregoing, I find that the plaintiff has failed to prove its case on a balance of probabilities against both defendants.

ISSUE 3: THE DEFENDANTS' COUNTERCLAIM

[99] Now, I move on the defendants' counterclaim, which is for the refund of the deposits paid to the plaintiff under the various tenancies. I agree that as corollary to my dismissal of the plaintiff's claims, all the deposits paid to the plaintiff ought to be refunded to the defendants, for the plaintiff is contractually bound to refund the same. Wherefore, I allowed the defendants' counterclaim and entered judgment for the first defendant in the sum of RM102,024 and RM102,244.50, being the deposit sums for the 11th and 12th floor tenancies; and for the second defendant in the sum of RM322,400 being the deposits sums for the 14th floor tenancy. When pronouncing judgment I had allowed interest on the second defendant's counterclaim at the rate of 5%pa, but inadvertently left out the award of judgment interest on the first defendant's counterclaim. I invite the Court of Appeal to correct that anomaly.

[100] I had also allowed cost of the claim and counterclaim to be borne and paid by the plaintiff. After having heard extensive submissions on cost, and having considered the nature of claim and counterclaim, the lengthy trial, issues canvassed, and the unusually lengthy submissions, both oral and written, I allowed cost in the sum of RM289,231 for the first defendant and the sum of RM196,285 for the second defendant.

Order accordingly.

Plaintiff's claim dismissed, counterclaims and refund of deposits allowed.

Reported by Ashok Kumar